

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>GEORGE J. PERK, JR.</b>	:	DETERMINATION
	:	DTA NO. 817123
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law	:	
and the New York City Administrative Code for the	:	
Period January 1, 1993 through June 30, 1994.	:	

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Petitioner, George J. Perk, Jr., P.O. Box 26, Green Village, New Jersey 07935-0026, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the period January 1, 1993 through June 30, 1994.

The Division of Taxation appearing by Barbara G. Billet, Esq. (Christina L. Seifert, Esq., of counsel) brought a motion for summary determination pursuant to 20 NYCRR 3000.5 and 3000.9(b) on the ground that petitioner failed to file a request for conciliation conference within 90 days of the issuance of the notices of deficiency. The Division of Taxation, together with its Notice of Motion, submitted the affidavit of Christina L. Seifert, Esq., with attachments, including the affidavits of Geraldine Mahon and James Baisley, in support of its motion on December 5, 2000. Petitioner's response was due on January 19, 2000, which date began the 90-day period for issuance of this determination.

Upon review of the pleadings, and the affidavits and documents submitted in support of the motion of the Division of Taxation, Catherine M. Bennett, Administrative Law Judge, renders the following order.

***ISSUE***

Whether the Division of Taxation has shown entitlement to a determination granting summary determination in its favor on the ground that the material facts presented show that petitioner's request for a conciliation conference with the Bureau of Conciliation and Medication Services was untimely.

***FINDINGS OF FACT***

1. The Division of Taxation ("Division") issued to petitioner, George J. Perk, the following notices of deficiency:

(a) A Notice of Deficiency, identified by Assessment ID L-015464924-3, dated August 17, 1998, asserting a penalty due in the amount of \$13,907.04 for the periods ended January 15, 1994 through June 30, 1994. The Notice of Deficiency is addressed to "Perk - George J Jr, 137 Stone Fence Rd, Bernardsville, NJ 07924-1727."

The Notice of Deficiency states that "You must file a Request for Conciliation Conference or a Petition For A Tax Appeals Hearing by 11/15/98." The notice then states, in part, "[i]f we do not receive a response to this notice by 11/15/98: This notice will become an assessment subject to collection action."

(b) A Notice of Deficiency, identified by Assessment ID L-015464921-6, dated August 17, 1998, asserting a penalty due in the amount of \$6,071.49 for the periods ended April 30, 1993 through December 31, 1993. The Notice of Deficiency is addressed to "Perk - George J Jr, 137 Stone Fence Rd, Bernardsville, NJ 07924-1727."

The Notice of Deficiency states that "You must file a Request for Conciliation Conference or a Petition For A Tax Appeals Hearing by 11/15/98." The notice then states, in part, "[i]f we

do not receive a response to this notice by 11/15/98: This notice will become an assessment subject to collection action.”

(c) A Notice of Deficiency, identified by Assessment ID L-015464923-4, dated August 17, 1998, asserting a penalty due in the amount of \$20,860.56 for the periods ended January 15, 1994 through June 30, 1994. The Notice of Deficiency is addressed to “Perk - George J Jr, 137 Stone Fence Rd, Bernardsville, NJ 07924-1727.”

The Notice of Deficiency states that “You must file a Request for Conciliation Conference or a Petition For A Tax Appeals Hearing by 11/15/98.” The notice then states, in part, “[i]f we do not receive a response to this notice by 11/15/98: This notice will become an assessment subject to collection action.”

2. All three notices of deficiency indicated that they were being issued in connection with Mr. Perk’s position as an officer or responsible person of American Futures Group, Inc. Petitioner claims he never received such notices of deficiency.

3. Petitioner did receive three notices and demands for payment dated December 18, 1998, addressed to him at P.O. Box 832, Bernardsville, New Jersey 07924-0832. It was from the receipt of such notices that petitioner filed a request for a conciliation conference.<sup>1</sup>

4. The Division submitted a copy of petitioner’s Request for Conciliation Conference, dated December 17, 1998. Petitioner requested the conference alleging that American Futures Group, Inc. had paid at least some, if not all of the tax asserted due against him. Additionally, petitioner argued he never received the notices of deficiency with respect to the alleged liabilities and had not been afforded the opportunity to contest them. Petitioner did receive a notice of

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<sup>1</sup> Petitioner’s representative suggests that the Division mailed the notices and demands before the date that appears on them, since petitioner filed his request for a conference the day before the date which appears on the notices and demands. No further evidence on this point was introduced into the record.

deficiency dated August 17, 1998, regarding a proposed assessment of \$1,893.15 for the periods ended April 30, 1993 to December 31, 1993, and requested a conference on November 5, 1998 which was then pending. Further, petitioner argued that he was not a person required to collect or pay over the taxes in issue. A copy of the Federal Express envelope bearing the Conciliation Request was attached to the request, bearing a ship date of December 17, 1998.

5. A Conciliation Order Dismissing Request, dated February 19, 1999, was issued by the Bureau of Conciliation and Mediation Services ("BCMS"), bearing the following explanation:

"The Tax Law requires that a request be filed within 90 Days from the date of the statutory notice. Since the notices were issued on August 17, 1998, but the request was not mailed until December 18, 1998, or in excess of 90 days, the request is late filed."

A timely petition was filed by petitioner with the Division of Tax Appeals in protest of the Order.

6. The Division submitted the affidavits of Geraldine Mahon, Principal Clerk of the Case and Resource Tracking System (hereinafter "CARTS") Control Unit of the Division since 1989, whose duties include supervising the processing of notices of deficiency and determination prior to sending the notices to the Division's mechanical section for mailing, and James Baisley, Chief Mail Processing Clerk, Mail Processing Center of the Division since 1994, whose duties include supervising the staff responsible for the delivery of outgoing mail to the post office, for each of the three assessments. These affidavits describe the general procedures for the preparation and mailing of the notices of deficiency, and describe how such procedures were followed in this case. The affidavits of Ms. Mahon and Mr. Baisley address all three notices in issue.

7. The general process for issuing and mailing notices of deficiency begins with the CARTS Control Unit's receiving a computer printout entitled "Assessments Receivable, Certified Record for Zip +4 Minimum Discount Mail," referred to as a Certified Mail Record,

("CMR"), and the corresponding notices of deficiency. The CMR is printed approximately ten days prior to mailing to allow time for processing and, therefore, the date on the CMR usually has to be changed to coincide with the date the notices are mailed. The notices themselves, on the other hand, are printed with the anticipated date of mailing. A certified control number is assigned to each notice, recorded on the notice itself and listed on the CMR under the heading "CERTIFIED NO."

A Division employee places each notice in an envelope. Once the notices are placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. Then a mail processing clerk compares the information on the envelopes with that on the CMR and counts the envelopes. At some point in this process an employee of the Mail Processing Center manually changes the date on the CMR (which reflects the date it was printed) to the date of delivery to the post office. An employee of the Mail Processing Center then delivers the sealed, stamped envelopes and the CMR to one of the various branch offices of the United States Postal Service ("USPS") located in the Albany, New York area. A postal employee signs and affixes a postmark to the CMR indicating receipt of the mail listed on the certified mail record and of the CMR itself. An employee of the Mail Processing Center also requests the USPS to either write in the number of pieces received at the post office in the space provided or, alternatively, to circle the number of the pieces listed to indicate that was the number of pieces received.

The Division does not in the normal course of business request return receipts. Therefore, the CMR is the Division's receipt for certified mail delivered to the post office. It is usually picked up from the post office the following day by an employee of the Mail Processing Center

and returned to the CARTS Control Unit. In cases of multi-page CMRs, the pages are connected when delivered to the USPS and remain connected even after being delivered back to the CARTS Control Unit, unless the Principal Clerk of the unit requests that the pages be disconnected.

8. In support of its position that the procedures outlined in Finding of Fact “7” were followed in this case, the Division has also submitted a copy of the CMR listing the notices at issue in this matter. The CMR consists of 40 pages with 11 entries on each page, with the exception of page 40 which bears 9 entries. It shows a printed date of “08/07/98” on each of the 40 pages. On page one the printed date has a line through it and above it is handwritten the date of “8-17-98.” There is a consecutive listing of 438 certified control numbers beginning with P 911 002 315 and ending with P 911 002 752. There is a Postal Service postmark of August 17, 1998 on each page of the CMR. On the last page next to “TOTAL PIECES AND AMOUNTS LISTED” appears the printed number 438. Below the phrase “TOTAL PIECES RECEIVED AT POST OFFICE” is a handwritten “438” and a set of initials.

Petitioner George Perk’s name is listed on page nine of the August 17, 1998 CMR. The certified number listed for the notices sent to petitioner are P 911 002 404, P 911 002 406, and P 911 002 407 which match the certified numbers shown at the top of petitioner’s notices. The notice numbers listed on the CMR for petitioner’s notice are L 015464921, L 015464923, and L 015464924, which match the numbers appearing on the notices. The name and address of petitioner, George Perk, is listed next and also corresponds to the information set forth on petitioner’s notices. There is a USPS postmark of August 17, 1998 on page nine of the CMR.

9. From the beginning of 1998 until May of that year, Mr. Perk resided at 137 Stone Fence Road, Bernardsville, New Jersey 07924, when he moved to 21 Mount Airey Road,

Bernardsville, New Jersey 07924. In July 1998, petitioner then moved to 272 U.S. Route 46 West, Suite 106, Rockaway Boro, New Jersey 07866.

10. The Division submitted the first two pages of petitioner's 1997 New York State Nonresident and Part-Year Resident Income Tax Return (Form IT-203). The return, dated April 14, 1998, shows petitioner's address as 137 Stone Fence Road, Bernardsville, NJ 07924.

The Division also submitted the first two pages of an Amended Nonresident and Part-Year Resident Income Tax Return (Form IT-203-X) for 1997 bearing petitioner's name. The return shows petitioner's address as 272 US Route 46 W, Suite 106, Rockaway Boro, NJ 07866. The amended return is date stamped as received by the Department of Taxation and Finance on August 20, 1998.

### ***SUMMARY OF THE PARTIES' POSITIONS***

11. Petitioner maintains that the Division has not proved mailing the notices because it has not provided any evidence of such mailing based upon personal knowledge of Division employees; the Division did not mail the notices to petitioner's last known address; the Division failed to cure petitioner's untimely protest to the notices of deficiency by a timely mailing of the notices and demands; and petitioner remains entitled to prepayment review of the notices and demands.

12. The Division argues that it is entitled to summary determination since petitioner did not meet his burden of proof to show that petitioner's protest of the notices of deficiency was timely.

### ***CONCLUSIONS OF LAW***

A. Any party appearing before the Division of Tax Appeals may bring a motion for summary determination as follows:

Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all the material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor (20 NYCRR 3000.9[b][1]; *see also*, Tax Law § 2006[6]).

In reviewing a motion for summary determination, an administrative law judge is constrained by the following guidelines:

The motion shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact. Where it appears that a party, other than the moving party, is entitled to a summary determination, the administrative law judge may grant such determination without the necessity of a cross-motion (20 NYCRR 3000.9[b][1], *see also*, Tax Law § 2006 [6]).

A party moving for summary determination must show that there is no material issue of fact (20 NYCRR 3000.9[b][1]). Such a showing can be made by “tendering sufficient evidence to eliminate any material issue of fact from the case” (*Winegrad v. New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316, 317, *citing Zuckerman v. City of New York*, 49 NY2d 557, 562, 427 NYS2d 595). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see, Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879, 881). In addition, the Court of Appeals has held:

One opposing a motion for summary determination must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Zuckerman v. City of New York, supra*).



B. It is the contention of the Division that it is entitled to summary determination in its favor because petitioner failed to file a timely request for a conciliation conference or petition for a tax appeals hearing in protest of the notices of deficiency in issue.

Tax Law § 681(a) authorizes the Division of Taxation to issue a Notice of Deficiency to a taxpayer where the Division determines that there is a deficiency of income tax. This section further provides that such a notice “shall be mailed by certified or registered mail to the taxpayer at his last known address.” The statute does not require actual receipt by the taxpayer. The Division is entitled to rely upon the address on the last return filed by the taxpayer unless the taxpayer clearly informs the Division that it wishes the address of record to be changed (*Matter of Brager*, Tax Appeals Tribunal, May 23, 1996, citing *Powell v. Commissioner*, 958 F2d 53, 92-1 US Tax Cas ¶ 50,147, *cert denied* 506 US 965; *Abeles v. Commissioner*, 91 TC 1019). Where the Division establishes that its statutory notice of deficiency has been properly issued, that is, sent by certified or registered mail to the taxpayer’s last known address, the notice is valid and sufficient whether or not actually received (*see, Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990; *Matter of Kenning v. State Tax Commn.*, 72 Misc 2d 929, 339 NYS2d 793, *affd* 43 AD2d 815, 350 NYS2d 1017, *appeal dismissed* 34 NY2d 667, 355 NYS2d 1028; *compare, Matter of Ruggerite, Inc. v. State Tax Commn.*, 97 AD2d 634, 468 NYS2d 945, *affd* 64 NY2d 688, 485 NYS2d 517). If the notice is properly mailed, the statute places risk of nondelivery on the taxpayer (*see, Matter of Malpica, supra*).

Where the timeliness of either a petition filed with the Division of Tax Appeals or a request for conciliation conference filed with BCMS is at issue, it is incumbent upon the Division to show that its original notice was properly mailed and when it was mailed. In

**Matter of Brager** (*supra* [a similar case dealing with the timeliness of a petition measured from the issuance of a notice of deficiency]) the Tax Appeals Tribunal summarized such requirements as follows:

When the timeliness of a filed petition is at issue, the Division must demonstrate proper mailing (**Matter of Katz**, Tax Appeals Tribunal, November 14, 1991; **Matter of Novar TV & Air Conditioner Sales & Serv.**, Tax Appeals Tribunal, May 23, 1991) . . . . To show that the notices were properly mailed to the taxpayer's last known address by certified or registered mail, the Division must provide evidence as to the general mailing procedure and evidence that this procedure was adhered to with respect to the notice in question (**Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra** ). Once this burden is met, a presumption of proper mailing arises (**Matter of MacLean v. Procaccino**, 53 AD2d 965, 386 NYS2d 111, 112). If, on the other hand, the Division fails to affirmatively carry its burden and the date of mailing is not established, the statutory time period is not triggered and the petition will be deemed timely filed (**Matter of Katz, supra; Matter of Huang**, Tax Appeals Tribunal, April 27, 1995; **Matter of Fuchs**, Tax Appeals Tribunal, April 20, 1995).

C. The Mahon and Baisley affidavits establish the general mailing procedures for mailing of notices of deficiency. The process begins in the CARTS Control Unit. Notices are printed with a future anticipated date of mailing to allow time for the processing of the notices. A certified control number is placed on each notice. The CMR lists each notice number, the name and address of the taxpayer and a corresponding certified mail number. The notices are placed in envelopes. In the Mail Processing Center, employees weigh and seal the envelopes containing the notices, ensure the proper postage and fees are affixed to the envelopes, compare the information on the envelopes with that on the CMR, count the envelopes, and change the date on page one of the CMR from the date it was printed to the date the CMR and notices are to be delivered to the post office. The CMR and the notices are then delivered to the post office. A postal employee signs or affixes a postmark to the CMR or both. With regard to the CMR for August 17, 1998, the Baisley affidavit states that the

postal employee is requested to either write in the number of pieces received at the post office in the space provided or circle the number for the pieces listed to indicate that was the number received. Usually the following day an employee of the Mail Processing Center returns to the post office to pick up the completed CMR. Completed CMRs are then returned to the CARTS Control Unit. In cases of multipage CMRs, the pages are connected when delivered to the United States Postal Service and remain connected even after being delivered back to the CARTS Control Unit, unless the Principal Clerk of the unit requests that the pages be disconnected.

D. The August 17, 1998 CMR, submitted into evidence, illustrates that the Division's mailing procedures were followed in this case. The name, address, notice numbers and certified control numbers on the notices issued to petitioner correspond with those listed on the CMR for petitioner, George Perk. The date of the Postal Service postmark on the page of the CMR listing the notices at issue, and the last page where the Postal Service employee's initials are found, indicates the notices were mailed on August 17, 1998. On page 40 of the CMR, the number "438" has been written under "TOTAL PIECES RECEIVED AT POST OFFICE" and beside initials of a Postal Service employee. In *Matter of Roland* (Tax Appeals Tribunal, February 22, 1996), the postal employee circled this figure to indicate the number of pieces of mail received by the USPS in that case. Unlike the situation in *Roland*, however, the affiant, Mr. Baisley, states the basis of his knowledge for this proposition. The Division's Mail Processing Center specifically requested that postal employees indicate the total number of pieces received by the USPS by either circling the number or writing the number on the certified mail record. This additional fact provides the element found to be lacking in *Roland*.

Accordingly, consistent with the reasoning in *Roland*, the Division has established that the notices of deficiency were mailed on August 17, 1998.

The Tax Appeals Tribunal has held that evidence of general mailing procedures together with a properly completed CMR is sufficient to prove mailing (*see, Matter of Katz, supra*). Since there is both with regard to the notices of deficiency in this matter, the Division is entitled to the presumption of proper mailing as to those notices on August 17, 1998.

E. As previously stated, the Division is entitled to rely upon the address on the last return filed by the taxpayer unless the taxpayer clearly informs the Division that it wishes the address of record to be changed (*see, Powell v. Commissioner, supra; Abeles v. Commissioner, supra*). In this case, the Division mailed the notices to petitioner at “137 Stone Fence Rd, Bernardsville, NJ 07924-1727,” on August 17, 1998. Petitioner argues that the Division did not mail the notices to petitioner’s last known address, since it added four digits to the existing five-digit zip code, thereby altering the address. This address, with the exception of the last four digits of the zip code, was the address petitioner provided to the Division based upon the last return filed by petitioner, Form IT-203 dated April 14, 1998.<sup>2</sup> The argument that the additional four digits to the zip code resulted in an address that is not representative of petitioner’s last known address is rejected. Clearly, the additional breakdown of the four additional zip code numerics does not change petitioner’s address, but merely enhances the accuracy of the delivery location. Every other critical component of petitioner’s address appeared as it should on the notices and the CMR. Moreover, failure to include a proper zip code does not mean that a notice was not mailed to the last known address

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<sup>2</sup> Although petitioner submitted an amended Form IT-203-X, the form was dated stamped as received by the Division on August 20, 1998, after the mailing of the notices in issue was completed.

(*Matter of Karolight, Ltd.*, Tax Appeals Tribunal, July 30, 1992). Thus, it is concluded that petitioner's last known address was used for the mailing of the notices in issue.

F. Petitioner next argues that the Division has not proven mailing since the information concerning the mailing as provided by the affidavits of Ms. Mahon and Mr. Baisley is stated without any personal knowledge of what actually took place in this case. The rules governing mailing are patterned after decisions of the United States Tax Court which interpret provisions of the Internal Revenue Code analogous to those at issue here (*see, Coleman v. Commissioner*, 94 TC 82; *Wheat v. Commissioner* 63 TCM [CCH] 2955; *Massie v. Commissioner*, 69 TCM [CCH] 2417, *affd* 82 F3d 423, 96-1 US Tax Cas ¶ 50,237; *Epstein v. Commissioner*, 58 TCM [CCH]128). In *Massie*, where the petitioner highlighted the lack of direct testimony concerning the mailing of the notice of deficiency and gaps in documentary evidence, the Tax Court stated that the Internal Revenue Service was not required to produce employees who personally recall each of the many notices of deficiency that are mailed (*id.*, at 2420). Requiring such personal knowledge would improperly extend the standard which is set forth concerning mailing of statutory notices, i.e., that the Division must provide evidence as to the general mailing procedure and evidence that this procedure was adhered to with respect to the notices in question (*Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*). Accordingly, petitioner's argument that Ms. Mahon and Mr. Baisley lacked personal knowledge sufficient to support a finding of proper mailing is rejected.

G. Next petitioner argues that his filing of the amended Form IT-203 (bearing an address different from the one properly used by the Division) should have prompted the Division to mail the subsequent notices and demands within the 90-day period petitioner had to respond to the notices of deficiency. There is no basis for such argument. A notice and

demand, essentially a bill to indicate moneys due, is generally mailed after the 90-day period for response to the notices of deficiency expires, since a taxpayer must be given an opportunity to protest such notices. The Division did not act improperly in its timing of the mailing of the notices and demands.

H. Pursuant to Tax Law § 681(b), petitioner had 90 days from the mailing of each Notice of Deficiency to file a petition with the Division of Tax Appeals or, in the alternative, to file a request for a conciliation conference with BCMS pursuant to Tax Law § 170(3-a), after which time a notice of deficiency becomes an assessment (Tax Law § 170[3-a]; § 689[b]; 20 NYCRR 4000.3[c]). The last day on which petitioner could have made a timely request for a conciliation conference with BCMS or filed a timely petition with the Division of Tax Appeals was November 16, 1998. Petitioner in this case chose to file a request for conciliation conference. Since the request was filed on December 18, 1998, the petition must be dismissed.

I. Petitioner's final argument is that he is entitled to a prepayment review of the notices and demands, citing *Meyers v. Tax Appeals Tribunal* (201 AD2d 185, 615 NYS2d 90, *lv denied* 84 NY2d 810, 621 NYS2d 519). Petitioner's reliance upon *Meyers* is misplaced. In *Meyers*, additions to tax were imposed upon the taxpayers for the underpayment and late payment of estimated income taxes. The Tax Appeals Tribunal had determined that the Tax Law specifically authorized the additions to tax by means of a notice and demand, and that no hearing is provided for when additions to tax are imposed by a notice and demand. The Court held Tax Law § 2006(4) imposes a duty to provide a hearing as a matter of right upon request, unless a right to such a hearing is specifically provided for, modified or denied by another provision of the Tax Law. Unlike *Meyers*, where the Court agreed there was no other

provision of the Tax Law which provided for a hearing in the circumstances of that case, here there was a prior opportunity for a hearing pursuant to Tax Law § 689(b). Having permitted the 90-day time period to lapse (Tax Law § 681), petitioner does not have an additional right to a hearing upon the issuance of the notices and demands.

J. It is noted that petitioner is not without recourse here, for he may pay the disputed tax and, within two years from the date of payment, apply for a refund (Tax Law § 687[a]). If his request for a refund is denied, petitioner may then proceed with another petition requesting a hearing or a conciliation conference (Tax Law § 689[c]; § 170[3-a][a]; ***Matter of Rosen***, Tax Appeals Tribunal, July 19, 1990).

K. Inasmuch as there are no triable issues of fact in this case which prevent a determination based on a motion for summary determination, the Division's motion for summary determination is granted as to Notices of Deficiency L-015464924-3, L-015464921-6 and L-015464923-4, all of which are dated August 17, 1998. Accordingly, the petition of George J. Perk, Jr. is hereby dismissed. .

DATED: Troy, New York  
April 19, 2001

/s/ Catherine M. Bennett  
ADMINISTRATIVE LAW JUDGE